

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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MARVIN M. BRANDT, and )  
MARVIN M. BRANDT REVOCABLE TRUST, )  
Plaintiffs, ) No. 09-265L  
v. ) Judge Emily C. Hewitt  
UNITED STATES OF AMERICA, )  
Defendant. )  
)

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**PLAINTIFFS' SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS**

In its Reply Memorandum In Support of Defendant's Motion To Dismiss Or, In The Alternative, To Stay Proceedings Pending Completion Of Related Case ("U.S. Reply Memo") (Dkt. No. 8.), the United States argues:

Because the question whether the United States could construct and operate a recreational trail was actually litigated and determined in the district court, and was resolved in favor of the United States, the Brandts cannot seek a second judicial determination of the question in this action, nor can they put the United States to the burden of litigating the question again.

U.S. Reply Memo at 5 (internal quotation and citation omitted). In support of this argument, the United States cites paragraph 6 of the Wyoming district court's March 2, 2009, Judgment, "[t]hat the interest hereby quieted and vested in the United States includes the right to construct and operate a recreational trail on the railroad right-of-way." U.S. Reply Memo at 3. As demonstrated below, there are two flaws with the United States' argument.

First, the issue of the scope of the abandoned railroad easement, and, specifically, whether the United States is allowed to construct and operate a recreational trail thereon, was never "actually litigated" in the district court. For example, the United States did not raise this

issue in its pleadings. *See* United States' Amended Complaint in *United States v. Wyoming and Colorado Railroad Co. Inc.*, No. 06-CV-0184J (Wyo. Dkt. No. 105).<sup>1</sup> Nor did the United States brief this issue. *See* United States' Brief in Support of Motion for Summary Judgment (Wyo. Dkt. No. 145);<sup>2</sup> United States' Reply Brief (Wyo. Dkt. No. 153);<sup>3</sup> United States' Response to Brandts' Motion for Summary Judgment (Wyo. Dkt. No. 148).<sup>4</sup> Finally, the district court never addressed this issue in its April 8, 2008, Memorandum Opinion. *See* Memorandum Opinion (Wyo. Dkt. No. 170).<sup>5</sup>

Second, even if the issue of whether the United States was allowed to construct and operate a recreational trail on the railroad easement was litigated, that would not bar the Brandts' taking claim. The Brandts' taking claim would not involve relitigation of that issue; instead, it would simply involve litigating whether the right to construct and operate a recreational trail was within the scope of the original railroad easement. *See Toews v. United States*, 376 F.3d 1371, 1375–1379 (Fed. Cir. 2004); *Preseault v. United States*, 100 F.3d 1525, 1541–1549 (Fed. Cir. 1996) (en banc). Thus, the Brandts cannot be collaterally estopped on this issue, among others, and the United States' Motion to Dismiss should be denied.

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<sup>1</sup> The United States' Amended Complaint is attached hereto as Exhibit 1.

<sup>2</sup> The United States' Brief in Support of Motion for Summary Judgment is attached hereto as Exhibit 2. On page 3 of that brief, the United States did mention in passing that it ultimately planned to use the abandoned railroad easement for a recreational trail. Yet, the United States never briefed whether the railroad easement was broad enough in scope to allow such a use.

<sup>3</sup> The United States' Reply Brief is attached hereto as Exhibit 3.

<sup>4</sup> The United States' Response To Brandts' Motion For Summary Judgment is attached hereto as Exhibit 4.

<sup>5</sup> The Memorandum Opinion is attached as Exhibit 3 to the Brandts' Response To Defendant's Motion To Dismiss Or, In The Alternative, To Stay Proceedings (Dkt. No. 6).

DATED this 26th day of August 2009.

Respectfully Submitted By:

MOUNTAIN STATES LEGAL FOUNDATION

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